Software Rights Archive, LLC v. Google Inc. et al Doc. 119

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION	Lead Case No. C-05-00037-JW
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	PLAINTIFFS' MOTION FOR ADMINISTRATIVE RELIEF PURSUANT TO CIVIL LOCAL RULE 7-11

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By this motion for administrative relief pursuant to Civil Local Rule 7-11, Melanie Tucker, Somtai Troy Charoensak and Mariana Rosen (collectively "Plaintiffs") hereby request the Court to clarify whether the discovery bifurcation provision of the case management order that governed one of the two cases consolidated into *The Apple iPod iTunes Anti-Trust Litigation* now governs the consolidated action. Plaintiffs oppose such bifurcation, for the reasons that follow:

I. Procedural Background of *Slattery/Charoensak v. Apple*

The first of the two actions consolidated into *The Apple iPod iTunes Anti-Trust Litigation* was filed on January 3, 2005, *Slattery v. Apple Computer, Inc.* ("*Slattery/Charoensak* action"). The second action, *Tucker v. Apple Computer, Inc*. ("*Tucker* action") was filed on July 21, 2006. Between the two actions, Defendant Apple Computer, Inc. ("Defendant") has filed a total of three motions to dismiss, the most recent one rejected by this Court's December 20, 2006 Order Denying Defendant's Motion to Dismiss in the *Tucker* action.

In the *Slattery/Charoensak* action, the parties filed their first joint case management statement on October 31, 2005, with Defendant requesting and Plaintiffs opposing an order bifurcating discovery into "class" and "merits" issues. The Court declined Defendant's request when it issued its case management order on November 15, 2005. On December 20, 2005, Plaintiffs submitted documents responsive to Defendant's first set of requests for production. On January 30, 2006, Defendant deposed named Plaintiff William Thomas Slattery, and on the same date Plaintiffs served their first set of requests for production and first set of interrogatories upon Defendant. On November 21, 2006, the Court entered a second case management order, this time agreeing to Defendant's request to bifurcate discovery.

II. Procedural Background of *Tucker v. Apple*

On January 17, 2007, Plaintiff Melanie Tucker in the *Tucker* action served her first discovery requests. While no bifurcation order had been issued in this second action, Plaintiffs, mindful that discovery had been bifurcated in the *Slattery/Charoensak* action, sought to meet and confer with Defendant to narrow the requests to issues bearing on class certification, and informally agreed without prejudice to proceed as if discovery had been bifurcated.

After the Court consolidated the two actions, Plaintiffs continued informally to proceed as if discovery had been bifurcated in the consolidated action. However, after several months of delay by Defendant, Plaintiffs have concluded that continuing to "meet and confer" with Defendant to determine which requests relate to class certification and which do not is unfeasible. Defendant objected to ***all*** of Tucker's first set of requests for production of documents, first set of interrogatories, and first set of requests for admission based on Defendant's contention that "this Court's November 21, 2006 Order Following Further Case Management Conference in *Charoensak, et al. v. Apple Computer, Inc.*, No. 05-00037 . . . applies to this related case" and that Plaintiffs' requests "do not relate to class certification issues."

Defendant has yet to produce ***any*** documents in response to the requests served on January 17, 2007. As of today, nearly two and a half years after the first action was filed, and after more than 20 meet and confer letters, calls, and e-mails, Defendant has only produced 66 pages of documents in total, 58 pages of which were not even deemed "confidential" by Defendant because they are simply print-outs from Defendant's webpage.

Further, despite Plaintiffs' willingness to agree to an informal limit on discovery, Defendant did not similarly limit its own discovery requests to Plaintiffs. For example, Defendant demanded Tucker provide to Defendant for inspection and copying her computer's hard drive, which contains many personal items such as private letters and photographs, all of her CDs and DVDs, and any credit card statement that contains a purchase of a CD or DVD. Sweeney Decl., ¶6.

III. Request for Clarification

Plaintiffs no longer view it practical to proceed informally as if discovery has been bifurcated, and are opposed to a formal bifurcation order. Plaintiffs therefore respectfully request that the Court agree to the attached Proposed Order Governing Discovery clarifying that the November 21, 2006 *Slattery/Charoensak* action case management order does not apply to *The Apple iPod iTunes Anti-Trust Litigation*. In the alternative, if the Court desires that the discovery process in the consolidated action be bifurcated, Plaintiffs have attached an Alternative Proposed Order Governing Discovery which limits discovery to class certification issues; preliminary issues such as Defendant's organizational structure; and documents whose production would impose only a *de* *minimis* burden on Plaintiffs or Defendant, such as all documents already produced in European litigation and government investigations involving similar antitrust claims against Defendant, and documents and deposition transcripts produced by Defendant as a third-party litigant in the *In re Napster, Inc. Copyright Litigation*, No. MDL-00-1369 (MHP) (N.D. Cal.).

DATED: July 9, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 9, 2007.

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